Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

HELEN VAN ANDERSON

Petitioner,

v.

STATE OF MISSOURI

Respondent.

ON WRIT OF CERITIORARI TO THE
MISSOURI COURT OF APPEALS,
SOUTHERN DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court declared that the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable and the defendant had the prior opportunity to cross-examine the declarant. In *Davis v. Washington*, 126 S.Ct. 2266 (2006) the Court determined that hearsay statements are testimonial when the primary purpose of the statement is to establish or prove past events that are potentially relevant to later criminal prosecution.

The question presented, which requires explanation in light of the above rulings, is

> Whether a court may exclude hearsay evidence consisting of a label on over-the-counter, sealed medications offered to prove the unopened contents of a container when the unknown declarant or author of the label was unavailable and had not previously been cross-examined.

PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceedings other than those listed in the caption.

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it is Nontestimonial Hearsay, Which is Admissible Because it Demonstrates Indicia of Reliability and is a "Firmly Rooted"Exception to the Hearsay Rule.

II. Some Circuits Have Continued to Rely on the Framework Advanced in *Ohio v. Roberts*, 448 U.S. 56 (1980) that Nontestimonial Hearsay is Admissible if it Bears Adequate Indicia of Reliability or Falls Within a "Firmly Rooted" Exception to the Hearsay Rule, Which is Contrary to the Court's Ruling in *Davis v. Washington*, 126 S.Ct. 2266. 2275 n 4., Where This Court Held That Nontestimonial Hearsay Did Not Violate the Confrontation Clause and Its Admissibility Should Be Governed by the Applicable Jurisdiction's Rules Of Evidence.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Helen Van Anderson respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Southern District, following a denial of petitioner's application for transfer by the Missouri Supreme Court.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is reported at 220 S.W.3d 454 (2007). The order of the court of appeals denying petitioner's motion for rehearing or transfer to the Missouri Supreme Court is unreported. (Pet. App. B). The order of the Missouri Supreme Court denying petitioner's application for transfer is unreported. (Pet. App. C).

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2007, when the Missouri Supreme Court entered its order denying petitioner's timely filed application to transfer. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

> have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Introduction

This case presents an important and recurring question regarding the admissibility of hearsay in a criminal prosecution when the witness is unknown, unavailable for the trial of the defendant, and has not been examined previously by the defendant and hearsay testimony is being offered to prove the contents of sealed over-the-counter medications through the medications' label of contents. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court declared that the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. In *Davis v. Washington*, 126 S.Ct. 2266 (2006) the Court determined that hearsay statements are testimonial when the primary purpose of the statement is to establish or prove past events that are potentially relevant to later criminal prosecution. With regard to non-testimonial statements, some circuits have continued to utilize the test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980). *United States v. Mooneyham*, 474 F.3d 280, 286 (6th Cir. 2007); *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006); *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006). Under *Ohio v. Roberts* nontestimonial statements do not offend the Confrontation Clause if they exist within a "firmly rooted" exception to the hearsay rule or if they are shown to be sufficiently reliable

because they are supported by "particularized guarantees of trustworthiness." *See* Roberts 448 U.S. 56, 66 (1980).

Here, the questions are two-fold: (a) Is a label on a common over-the-counter medication testimonial in nature, and (b) If the label is nontestimonial, must it meet the tests of "particularized guarantees of trustworthiness" or dwell in a "firmly rooted" exception to the hearsay rule in light of the rulings in *Crawford* and *Davis*, which significantly changed the law with regard to hearsay. Because this Court has not addressed this question or others flowing from it with regard to the Confrontation Clause requirements laid out in *Crawford v. Washington* 541 U.S. 36 (2004) and its offspring, it is worthy of consideration by the Court.

B. Factual and Procedural Background

On December 30, 2002, Helen Van Anderson was stopped near the city limits of Springfield, Missouri, for violating municipal traffic ordinances. (Trial Transcript, p. 201-202, hereinafter referred to by the letter "T." followed by the page number) Ms. Van Anderson had earlier been observed purchasing over-the-counter medications that authorities believed contained pseudoephedrine, a precursor chemical that can be used in the illegal production of methamphetamine. T. 203 Following the traffic stop, Officer Nash seized six boxes of "Target cold and allergy pills" bearing labels that listed pseudoephedrine among other ingredients. Petitioner's Appendix A, at 1a. At trial, the sealed, labeled boxes were admitted into evidence over Ms. Van Anderson's objection that the label information was impermissible hearsay, that the contents had never been tested for the presence of pseudoephedrine and that there was no proper foundation prior to admission. T. 208, 210, 212, 213, 219. No testing of any type was utilized to determine the nature of the substances in the boxes. T. 219-222.

On appeal, petitioner argued there was insufficient foundation to admit the labeled boxes that allegedly contained pseudoephedrine, and, further, after respondent in its brief argued that the so-called label exception to the hearsay rule permitted the admission of over-the-counter label statements on state's exhibits 1 and 3[1], petitioner argued in her reply that the rulings in *Crawford v. Washington*, 541 U.S. 36 (2004); and *Davis v. Washington*, 126 S.Ct. 2266 (2006) and followed in *State v. Justus*, 205 S.W.3d 872 (Mo. Banc, 2006) and *State v. March*, 216 S.W.3d 633 (Mo. Banc, 2007), made reliability irrelevant when the author of the label was unavailability and there could be no cross-examination.

The Missouri Court of Appeals, Southern District, disposed of the appeal by refusing to disturb the trial court's broad discretion to admit or exclude evidence. Petitioner's Appendix A. at 3a. In a concurring opinion Judge Scott found that label statements fell "within Crawford's discussion of non-testimonial hearsay" and, therefore, "was exempt from Confrontation Clause challenge." Petitioner's Appendix A, at 6a.

The court of appeals denied petitioner's timely filed motion for rehearing or, in the alternative, to transfer to the Missouri Supreme Court, on April 16, 2007. Petitioner's Appendix B, at 1b. On May 31, 2007, the Missouri Supreme Court denied petitioner's timely filed application to transfer pursuant to Rule 84.03 of the Missouri Rules of Civil and Criminal Procedure. Petitioner's Appendix C, at 1c.
This petition followed.

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[1] Exhibits one and three were the sealed, over-the-counter medication boxes with content labels in which the illegal substance was allegedly contained.

C. Reasons for Granting the Writ

The federal courts of appeal and state supreme courts continue to explore and struggle with the nature of testimonial and nontestimonial hearsay. As a result, some circuits are at variance with this Court, especially with regard to admissibility standards of reliability and other "firmly rooted" hearsay exceptions when at issue in the admissibility of nontestimonial hearsay statements.

Because there are many occasions over the course of time when parties to criminal litigation seek to admit hearsay evidence, it is important to resolve continuing disputes in federal and state courts arising out of *Crawford* and *Davis*. Also significant, is that the so-called "label exception," which the Missouri Court of Appeals seeks to legitimize as nontestimonial hearsay is neither a "firmly rooted" nor reliable exception to the hearsay rule and requires analysis by this Court in order to further define the limits of *Crawford* and *Davis*.

The Missouri Court of Appeals, Southern District, Decision Squarely Conflicts with this Court's Ruling in Davis v. Washington, 126 S.Ct. 2266.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 126 S.Ct. at 2273-2274.

Under this framework the package label identifying the contents of the over-the-counter medications in this case is clearly testimonial hearsay. It is equally apparent that there was no opportunity to cross-examine the author of the label, whose identity remains unknown.

Hearsay is testimonial if it is offered "...to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 126 S.Ct. at 2274. Likewise, hearsay is testimonial as it applies to witnesses against the accused, that is those bearing testimony. *Id.* In turn, testimony is typically "a solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Id.*

Here, labels on the over-the-counter, cold medications seized from petitioner were offered to prove an element of the crime she was charged with – possession of the precursor chemical pseudoephedrine. No other evidence was offered to prove the contents of the seized packages.

Additionally, the chemical listings on the labels were not uttered in connection with an ongoing emergency or imminent danger. On the contrary, the label statements were voiced not to resolve a present emergency but, rather, to prove a past event relevant to the prosecution of Ms. Anderson, i.e. the chemical composition of the contents of the seized packages. *Id.* at 2276.

The Missouri Court of Appeals, Southern District, erred because it failed to conduct a *Crawford* and *Davis* analysis to determine whether labels on the sealed, over-the-counter medications seized from petitioner were testimonial in nature. Had the court engaged in this type of analysis there is substantial reason to believe they would have concluded the evidence was inadmissible because the

author of the label was unknown and unavailable and had not previously been subject to cross-examination.

There is Confusion Among the Circuits and State Supreme Courts as to Whether the Reasoning in Ohio v. Roberts, 448 U.S. 56 (1980), Remains Viable in Any Respect as to Nontestimonial Hearsay, Given the Rulings in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 126 S.Ct. 2266 (2006).

Regarding the admissibility of nontestimonial statements, some circuits have continued to utilize the test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980). *United States v. Mooneyham*, 474 F.3d 280, 286 (6th Cir. 2007); *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006); *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006). Specifically, under *Ohio v. Roberts* nontestimonial statements do not offend the Confrontation Clause if they exist within a "firmly rooted" exception to the hearsay rule or if they are shown to be sufficiently reliable because they are supported by "particularized guarantees of trustworthiness." See Roberts 448 U.S. 56, 66 (1980).

However, FN 4 in Davis states:

> "Roberts condition[ed] the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' " Crawford, 541 U.S., at 60, 124 S.Ct. 1354 (quoting Roberts), 448 U.S. at 66, 100 S.Ct. 2531). We overruled Roberts in Crawford by restoring the unavailability and cross-examination requirements.

The notation leads one to question whether nontestimonial statements are now admissible without a showing of trustworthiness or the presence of a firmly rooted hearsay exception. The Sixth Circuit in *United States v. Mooneyham*, 473 F.3d 280, 287 (6th Cir. 2007) adhered to the *Roberts* standard as did the ( )urt in *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006). Also, in *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006) the 7th Circuit noted that *Davis* appears to vitiate *Roberts* applicability to nontestimonial hearsay.

This Court's attention to the uncertainty present in *Davis* as it relates to nontestimonial hearsay would benefit inferior courts across the country and bring needed clarity to the dimensions of the Confrontation Clause.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted

Respectfully submitted,

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